FRANCIS ANTHONYSAMY

v.

PP

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ALAUDDIN MOHD SHERIFF JCA
ABDUL AZIZ MOHAMAD JCA
[CRIMINAL APPEAL NO: C-05-87-96]
23 JANUARY 2003

EVIDENCE: *Statement - Cautioned statement - Actual words of caution administered not read out in evidence - Failure of the recording officer to ask the accused whether he was induced to make the statement - Whether there was non-compliance with s. 113 Criminal Procedure Code*

EVIDENCE: *Statement - Cautioned statement - Voluntariness of cautioned statement - Standard of proof - Whether rightfully applied by trial judge*

EVIDENCE: *Information leading to fact discovered - Admissibility of statements - Whether admissibility depends on voluntariness - Whether caution on self-incrimination should be administered - Evidence Act 1950, s. 27*

CRIMINAL PROCEDURE: *Disclosure of information - Statement of accused - Admissibility - Whether admissibility depends on voluntariness - Whether caution on self-incrimination should be administered - Evidence Act 1950, s. 27*

CRIMINAL LAW: *Murder - Defence of drunkenness - Rejected by trial judge - Whether on the absence of scientific evidence - Whether a misdirection - Whether trial judge was inconsistent with his finding on accused's state of drunkenness*

This was an appeal by the appellant against his death sentence by the High Court for the murder of a Bangladeshi national whom he allegedly killed for the purpose of obtaining a human skull in order to win a four-digit lottery.

The issues were: (1) Whether there was non-compliance with s. 113 Criminal Procedure Code ('CPC') in respect of the cautioned statement as the actual words of the caution that was administered were not read out in evidence, and also as the recording officer did not ask the appellant whether he was induced to make the cautioned statement; (2) Whether the trial judge had

rightfully applied the standard of proof required for the voluntariness of the cautioned statement; (3) Whether the appellant's statements admitted under s. 27 Evidence Act 1950 ('EA') should be made voluntarily and even if made voluntary, a caution on self-incrimination should have been administered; (4) Whether the trial judge had misdirected himself in rejecting the defence of drunkenness on the absence of scientific evidence; and (5) Whether the contents of the passage quoted from the grounds of decision of the trial judge were inconsistent with his finding expressed at the end of the trial on the appellant's state of drunkenness.

Held:

Per Abdul Aziz Mohamad JCA

[1] The evidence showed that the caution prescribed in para. (ii) of the proviso to s. 113 CPC was administered. There was no need for the recording officer and the interpreter to state in evidence the actual words used. It must be accepted that the caution given was in the prescribed words unless there was any indication or proof to the contrary. (p 839 d)

[2] The failure of the recording officer to ask the appellant about inducement was not in itself a ground for disqualifying the cautioned statement because as the Federal Court said in *Juraimi Husin v. PP* and as was apparent from the way para. (i) of the proviso to s. 113 CPC was worded, there was nothing in s. 113 that called for a recording officer to be satisfied that a statement was made voluntarily before recording it and "the legislature by the terms of the language employed has left the determination of the question of voluntariness to the court and not to the recording officer." Further, the trial judge had found that there was no inducement. (p 840 a-c)

[3] The trial judge had recognised that the burden on the prosecution was to prove voluntariness beyond reasonable doubt and that the prosecution would have failed to discharge the burden if the accused could show on a balance of probabilities that he was assaulted. Balance of probabilities was not the standard for the prosecution but one for the appellant in order to prove his allegation in face of the prosecution evidence that the statement was made voluntarily. (p 840 f-g)

[4] The question that arose in *Goi Ching Ang v. Public Prosecutor* was one of voluntariness and not of self-incrimination. Therefore, the court was hesitant to accept that case as stating that for a s. 27 statement to be admissible it must be given after its maker had been cautioned against self-incrimination. In this case the question of fact whether a

caution against self-incrimination was given to the appellant did not arise because the appellant had not objected to the admission of the statements concerned. (p 842 e-g)

[5] It was clear from the grounds of the decision of the trial judge, that the standard of proof required of the appellant for the defence of drunkenness was on a balance of probabilities. After considering the appellant's conduct as proved by the prosecution, the trial judge did not find it probable that the state of his mind was impaired or affected by intoxication. In mentioning the absence of scientific evidence, the trial judge did not mean that the appellant's defence could not be accepted without the support of scientific evidence. What he meant was that based on the whole evidence it was not probable that the appellant was unconscious or had no intention to cause the death of the deceased based on the whole evidence, and if ever what was so obvious from the evidential material that was available could be disturbed, it could be disturbed only by some scientific evidence. (p 845 a-c)

[6] It was clear that the trial judge, in his judgment, did not discount the probability that the appellant was drunk. He did not find the appellant drunk to the extent that he was unconscious or incapable of forming the intention to cause death. After considering the conduct of the appellant, the trial judge found that the appellant was not that drunk. (p 845 d)

[7] The evidence in its entirety clearly showed that the appellant killed the deceased deliberately for the purpose of obtaining a human skull that he believed was needed in order to win a four-digit lottery. (p 845 e)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan perayu terhadap hukuman mati terhadapnya bagi pembunuhan seorang warganegara Bangladesh. Perayu dipercayai membunuhnya bagi tujuan memperolehi sebiji tengkorak manusia untuk tujuan memenangi loteri empat digit.

Isu-isunya ialah:(1) sama ada terdapat ketidakpatuhan s. 113 Kanun Acara Jenayah ('KAJ') berkenaan pernyataan beramaran disebabkan perkataan-perkataan sebenar yang digunakan dalam amaran tersebut tidak dibacakan dalam keterangan, dan juga disebabkan pegawai yang merekodkan pernyataan tersebut tidak menyoal perayu sama ada ia didorong membuat pernyataan tersebut; (2) sama ada hakim bicara mengguna pakai taraf pembuktian yang betul dalam menentukan kesukarelaan pernyataan beramaran tersebut; (3) sama ada

pernyataan-pernyataan perayu yang diterima di bawah s. 27 Akta Keterangan 1950 harus dibuat dengan sukarela dan jika begitu, sama ada satu amaran berhubung 'self-incrimination' patut diberikan; (4) sama ada hakim bicara tersalah arah apabila menolak pembelaan mabuk oleh perayu atas alasan tiada keterangan saintifik; dan (5) sama ada kandungan petikan dari alasan-alasan keputusan hakim bicara tidak konsisten dengan pendapatnya pada akhir pembicaraan berkenaan kemabukan perayu.

Diputuskan:
Oleh Abdul Aziz Mohamad HMR

[1] Keterangan menunjukkan bahawa amaran di bawah perenggan (ii) proviso kepada s. 113 KAJ telah diberikan. Tiada keperluan bagi pegawai yang merekodkan pernyataan beramaran dan jurubahasa untuk menyatakan dalam keterangan perkataan-perkataan sebenar yang digunakan. Ia patut diterima bahawa amaran telah diberikan seperti yang ditetapkan kecuali jika terdapat bukti sebaliknya.

[2] Kegagalan pegawai yang merekodkan pernyataan beramaran untuk menyoal perayu sama ada ia didorong untuk membuatnya bukan satu alasan untuk menolak pernyataan tersebut. Berdasarkan keputusan Mahkamah Persekutuan dalam kes *Juraimi Husin v. PP* dan perenggan (i) proviso kepada s. 113 KAJ, s. 113 tidak memerlukan pegawai yang merekodkan pernyataan beramaran untuk berpuashati bahawa ianya dibuat secara sukarela sebelum merekodkannya. Lagipun, dari bahasa yang terpakai dalam seksyen tersebut, badan perundangan telah meninggalkan soal penentuan kesukarelaan pernyataan itu kepada mahkamah dan bukan kepada pegawai yang merekodkannya. Hakim bicara juga mendapati bahawa tidak terdapat dorongan.

[3] Hakim bicara mengiktiraf bahawa beban membukti yang dipikul pihak pendakwa berkaitan kesukarelaan sesuatu pernyataan adalah melebihi keraguan munasabah dan pihak pendakwa gagal melepasi beban itu jika tertuduh dapat menunjukkan atas imbangan kebarangkalian bahawa ia dipaksa membuatnya. Imbangan kebarangkalian bukanlah tahap bagi pihak pendakwa tetapi bagi perayu untuk membuktikan sebaliknya.

[4] Soalan yang timbul dalam kes *Goi Ching Ang v. Public Prosecutor* adalah berkenaan kesukarelaan dan bukan berkenaan 'self-incrimination'. Dengan itu, mahkamah ragu-ragu untuk menerima kes itu sebagai menentukan bahawa pembuat pernyataan harus terlebih dahulu diberi amaran berkaitan 'self-incrimination' sebelum pernyataannya boleh

diterima di bawah s. 27 Akta Keterangan 1950. Dalam kes ini, soalan tersebut tidak timbul kerana perayu tidak membantah penerimaan pernyataan-pernyataannya.

[5] Adalah jelas dari alasan-alasan keputusan hakim bicara bahawa tahap bukti yang perlu ditunjukkan oleh perayu bagi pembelaan kemabukan ialah atas imbangan kebarangkalian. Selepas menimbang kelakuan perayu seperti yang dibuktikan oleh pihak pendakwa, hakim bicara berpendapat tiada kemungkinan keadaan pemikirannya dijejas atau diganggu oleh kemabukan. Dalam memperkatakan bahawa tiada keterangan saintifik untuk menyokong pembelaan tersebut, hakim bicara tidak bermaksud bahawa pembelaan perayu tidak boleh diterima tanpa sokongan keterangan tersebut. Apa yang dimaksudkan beliau adalah perayu tidak mungkin tidak sedar atau tidak berniat untuk menyebabkan kematian si mati berdasarkan keseluruhan keterangan, dan jikapun apa yang terserlah jelas daripada keterangan itu boleh diganggu, ianya hanya boleh diganggu melalui keterangan saintifik.

[6] Adalah jelas bahawa hakim bicara, dalam penghakimannya, tidak menolak kebarangkalian bahawa perayu dalam keadaan mabuk. Tetapi beliau mendapati bahawa perayu bukanlah sebegitu mabuk hinggakan ia tidak sedar atau tidak mampu membentuk niat untuk membunuh. Selepas mempertimbangkan kelakuan perayu, hakim bicara mendapati bahawa perayu tidak begitu mabuk.

[7] Keseluruhan keterangan jelas menunjukkan bahawa perayu membunuh simati dengan sengaja bagi tujuan memperolehi sebiji tengkorak manusia yang ia percayai diperlukan untuk memenangi loteri empat digit.

Rayuan ditolak.]

Case(s) referred to:
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Juraimi Husin v. PP [1998] 2 CLJ 383 CA ***(refd)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 27, 112, 113
Penal Code, s. 86

For the appellant - Karpal Singh (Jagdeep S Deo); M/s Karpal Singh & Co
For the respondents - Anselm Charles Fernandes DPP

[Appeal from High Court, Temerloh; Criminal Trial No: 45-3-1995]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad JCA:

The finding on 23 August 1994 in the Kim Swee Leong oil-palm estate in Mentakab by an estate worker of the headless body of Ali Ahammed bin Mohammed Ullah, a Bangladesh national, led to police investigations that resulted in the prosecution, and conviction on 31 October 1996 by the High Court at Temerloh, of the appellant for the murder of the said Ali Ahammed. The appellant was sentenced to death. On 18 September 2002 we dismissed his appeal.

The principal witness for the prosecution, and the only eye-witness to the events leading to Ali Ahammed's death, was one Meganathan a/l Mariapen (SP4). His evidence, as set out in the trial judge's grounds of decision, was essentially as follows.

On the date of the murder, which was 19 August 1994, the appellant was staying with Meganathan and his family in Ladang Kurnia Setia, Charuk Puting, Temerloh. The appellant and Meganathan were workers of the Ladang Kurnia Setia, as also was the deceased, who was known to them both.

Three or four weeks before that date, in a discussion as to how to win a four-digit lottery, the appellant had told Meganathan that what it needed were a human skull and the help of a bomoh.

On the evening of that day, when the appellant and Meganathan were travelling in a motor-car from their home to go to Kampung Awah, the deceased sought and got a lift from them to Batu 5 Jalan Maran, where, at the deceased's invitation, Meganathan joined him for a drink in a shop. The appellant, who had turned down the invitation, remained in the car. After the drink, the deceased now also wanting to go there, the three proceeded to Kampung Awah, where the appellant bought a bottle of samsu and two cans of beer. On the journey back to Charuk Puting, the appellant and the deceased, who were sitting at the back, helped themselves to the drinks. At the appellant's request, they stopped at his mother's house in Ladang Kim Swee Leong, where only the deceased continued drinking. They left the house of the appellant's mother at about 9pm for Charuk Puting, but on the way the appellant asked Meganathan to stop the car, saying he wanted to finish his drink. The appellant asked Meganathan to drive deep into the oil-palm estate, saying that it was to avoid their being caught drinking by some police patrol. At a spot that could not be seen from the main road, the car stopped and they all got down. Meganathan sat on the bonnet eating peanuts, while the appellant and the deceased were drinking

at the rear of the car. On hearing the sound of the deceased's voice and of someone being hit, Meganathan went to the rear of the car and saw the appellant hitting the deceased on the head with a rattan cane twice. The deceased fell to the ground and the appellant, carrying a parang with him, dragged him away. After a while the appellant returned saying he had lost the parang and asked Meganathan to drive him to a temple some distance away to get another parang. So they drove to the temple, where the appellant obtained a parang. They then returned to the place where the deceased's body had been left. The appellant went to the deceased's body, asking Meganathan to remain in the car, from where Meganathan heard the sound of hacking. Soon after, the appellant returned to the car carrying a bundle, which he placed in the boot of the car together with the parang, the rattan cane and the deceased's shirt and trousers. They then resumed their journey back to Charuk Puting, stopping at two more places on the way. One stop was somewhere on Jalan Maran, where the appellant threw the parang, rattan cane, shirt and trousers into a swamp by the side of the road. The next stop was not long after, when the appellant took the bundle, which was in a black plastic container, to a place among some oil-palm trees by the roadside, and concealed the bundle and the plastic container under some oil-palm fronds.

Late in the afternoon of the next day, 20 August 1994, Meganathan saw the appellant leaving their house on a motor-cycle and returning with a cangkul. The appellant told Meganathan that he had buried the deceased's head.

That, according to the trial judge's grounds of decision, was the evidence of Meganathan.

The appellant was arrested on 26 August 1994. When interrogated by ASP Mohd. Sabri bin Muhamad, the investigation officer, at 10.32pm on that day, the appellant said, besides other things, "Tanam kepala Ali di kebun kelapa sawit Charuk Puting". At the trial the appellant's counsel did not object to the admission of the written record of that statement (P46A): notes, p. 111 D-E. That same night, after the interrogation, the appellant and Meganathan, who was also in police custody, led ASP Mohd. Sabri and other police officers to a spot at the 3rd Kilometer, Jalan Maran – Temerloh, where the appellant told ASP Mohd. Sabri, "Sinilah saya buang itu parang, rotan dan seluar Ali". A pair of trousers was found hanging from the branch of a dead tree and a rattan cane was found on the ground beneath the branch. The appellant and Meganathan next, at about 11.50pm, led the police party into Ladang Charuk Puting to a spot where the appellant

said to ASP Mohd. Sabri, "Sinilah tempat saya tanam kepala Ali". A man's head wrapped in a shirt was found buried in the ground. At a little distance from there, the appellant told ASP Mohd. Sabri, "Sinilah tempat buang plastik isi kepala Ali". A black plastic container was found thereabouts.

Those three statements that the appellant made at the scene were recorded in a police report made by ASP Mohd. Sabri. The appellant's counsel had no objection to their admission and they were admitted as P50A, P50B and P50C: notes, p. 112C.

The next day, 27 August, at about 12.15pm, the appellant and Meganathan led Chief Inspector Mohamed Jamal bin Mat Nor and a police party to a location at the 3rd Kilometer Jalan Maran-Temerloh where the appellant said to C.I. Mohamed Jamal, "Sinilah saya buang itu parang". A parang was found there. C.I. Mohamed Jamal recorded the statement in a police report (P45), the admission of which the appellant's counsel had no objection to: notes, p. 98 A-B.

On 30 August 1994 the appellant gave a confessionary cautioned statement which in essential particulars was consistent with what has been set out earlier as the evidence of Meganathan. The appellant also confessed in the statement that the purpose of the killing was to obtain a human skull to bring to a bomoh in order to win a four-digit lottery and that on the day in question the opportunity that he had been waiting for had presented itself (meaning undoubtedly in the person of the deceased).

In his submission before us, Encik Karpal Singh, counsel for the appellant, raised three issues. We will deal first with the issue of the cautioned statement. Section 113 of the Criminal Procedure Code provides for the admissibility in evidence at his trial of statements made in certain circumstances by any person charged with any offence, but proviso (a) to sub-s. (1) prohibits the admission or use of any such statement:

> (i) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or
>
> (ii) in the case of a statement made by the person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

Encik Karpal Singh submitted as regards the cautioned statement that there had been non-compliance with s. 113 in certain respects and that therefore it should have been rejected.

Encik Karpal Singh referred to p. 62 B of the notes, where the recording officer, Chief Inspector Md. Azmi bin Othman, said that he read out to the appellant the cautions prescribed in para. (ii) of the said proviso, and to p. 68 D where the interpreter said that C.I. Md. Azmi read out one by one ("satu persatu") the caution that the interpreter was to, and did, translate. Encik Karpal Singh submitted that the actual words of the caution that was administered should, according to practice, have been read out in evidence, but that was not done in this case. We disagreed. According to the evidence, the caution prescribed by the said para. (ii) was administered. The words actually used in giving the caution were set out at the beginning of the statement form and they were the Malay version of the words prescribed in the said para. (ii). There was no need for the recording officer and the interpreter to state in evidence the actual words used. It must be accepted that the caution given was in the prescribed words unless there was any indication or proof to the contrary.

As regards whether the making of the cautioned statement was caused by any inducement, threat or promise of the kind specified in para. (i) of the proviso, the recording officer said at p. 62 B of the notes that he had asked the appellant whether he was "dijanjikan, dipaksa, diugut" to make the statement, to which the reply was no. Encik Karpal Singh submitted that the appellant was not also asked whether he was didorong (induced) to make the statement. It was true that dijanjikan, dipaksa, diugut meant promised, compelled, threatened and that "induced" was absent from the question. Encik Karpal Singh also referred to the evidence of the interpreter at p. 71 B of the notes that he was not sure whether the recording officer ever asked him to translate the question whether the appellant was going to give his statement voluntarily. We understood this aspect of the submission to be intended as a criticism of the conduct of the recording officer in the matter of the recording of the cautioned statement, as much as to say that the recording officer, before recording the appellant's statement, failed to ask the right questions to satisfy himself that the appellant was going to give his statement voluntarily. It was not a criticism of the conduct of the trial judge, who did find at p. 92 C of the notes that the cautioned statement

was given by the appellant "free from any inducement, threat or promise". On that view of Encik Karpal Singh's submission, we were of opinion that the failure of the recording officer to ask the appellant about inducement was not itself a ground for disqualifying the cautioned statement because, as the Federal Court (by Gopal Sri Ram JCA) said in *Juraimi Husin v. Public Prosecutor* [1998] 2 CLJ 383 CA at p. 409 g-i and as is apparent from the way the said para. (i) is worded, there is nothing in s. 113 that calls for a recording officer to be satisfied that a statement was being made voluntarily before recording it and "The legislature by the terms of the language employed has left the determination of the question of voluntariness to the court and not to the recording officer". As stated before, the trial judge found there was no inducement.

Finally, as regards the cautioned statement, Encik Karpal Singh submitted that the trial judge applied the wrong standard of proof, namely that of balance of probabilities, for the voluntariness of the cautioned statement. The words that came under criticism were those after the first sentence in the following passage in the judgment of the trial judge after the secondary trial to determine the admissibility of the cautioned statement:

> With regards to the accused assertion that he was assaulted while under remand, I have this to say while the prosecution is under obligation to prove beyond reasonable doubt that I/D 43 was given by the accused free of any kind of coersion *(sic)* inducement or promise. The defence in asserting that the accused was assaulted, must come up with some form of evidence to show on the balance of probabilities that what was alleged could have occurred. This, the defence did not do. The assertion remains just a bare allegation.

It was clear to us that the judge recognized that the burden on the prosecution was to prove voluntariness beyond reasonable doubt, and that the prosecution would have failed to discharge the burden if the accused could show on a balance of probabilities that he was assaulted. Balance of probabilities was not the standard for the prosecution but one for the appellant in order to prove his allegation in face of the prosecution evidence that the statement was made voluntarily. It may be questioned whether the trial judge was right as regards the burden on the appellant because in *Juraimi Husin, supra*, Gopal Sri Ram JCA said at p. 408 c, that "the only burden that rests upon an accused is to place before the judge such facts as raise a well-grounded suspicion that the statement was made involuntarily", but that was not what Encik Karpal Singh questioned. His submission arose out of a misconception of the words of the trial judge as meaning that to him the burden on the prosecution was one of proof on a

balance of probabilities. The trial judge, as we stated just now, clearly recognized that the burden on the prosecution was one of proof beyond reasonable doubt.

Another issue raised by Encik Karpal Singh concerned the various aforementioned statements made by the appellant on 26 and 27 August 1994, which were admitted, and which the appellant's counsel had no objection to their admission, under s. 27 of the Evidence Act 1950 as information leading to discovery. Encik Karpal Singh referred to *Goi Ching Ang v. Public Prosecutor* [1999] 1 MLJ 507 FC. In that case the trial judge was highly suspicious as to the voluntariness of a s. 27 information. He said there was a great possibility that the accused had been tortured while in police custody. He entertained grave doubt that the accused would have given the information if he had not been tortured, threatened or induced. See p. 524 E. Yet he admitted the information. The question that arose for decision in that case, which was raised by Encik Karpal Singh himself, was whether to render a s. 27 information admissible it must have been made voluntarily. Encik Karpal Singh contended that it must and he relied on *Md Desa Hashim v. Public Prosecutor* [1995] 4 CLJ 677 FC, a decision of the Federal Court. The Federal Court in *Goi Ching Ang* (by Chong Siew Fai CJ Sarawak & Sabah) observed (pp. 520 I-521 C) that prior to *Md Desa* the Malaysian courts had consistently held that a s. 27 information was admissible even though it may not have been given voluntarily, and took the stand (p. 524 A-B) that that position of the law should not be departed from, although they agreed with *Md Desa*, as a matter of policy, that voluntariness was desirable. They said that any change in the law was a matter for the legislature, but since in that particular case the trial judge had entertained grave doubt as to the voluntariness of the information, "it was open to the trial court to exercise its discretion whether to let in the information as part of the trial" (p. 526 G-H). The Federal Court concluded at p. 527 E-G:

> In short, since the learned trial judge in the instant case under appeal had found that the s. 27 information of the appellant was not voluntarily made, it is irrelevant. It was not the appellant's own statement and was extracted from him in contravention of the privilege against self-incrimination and would be unfair to have it admitted against him. The facts and circumstances of the case show that the s. 27 information obtained has an adverse effect on the fairness of the proceedings so that the learned trial judge ought not to have admitted it.

The Federal Court, however, just before that conclusion, that is at p. 527 E, interpolated this statement:

> Moreover, admitting the appellant's s. 27 information would infringe the principle of the right against self-incrimination, there being no evidence of s. 112(ii), (iii) and (iv) of the Criminal Procedure Code having been complied with.

It was that statement, as reflected in holding (2) in the headnote, that Encik Karpal Singh relied on before us in connexion with the s. 27 bits of information in this case.

As far as self-incrimination is concerned, sub-s. (iv) (now (4)) of s. 112 requires a police officer examining a person under sub-s. (i) (now (1)) to first inform him that he "may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture" (proviso to sub-s. (ii) (now (2)).

Since Encik Karpal Singh did not contend that the s. 27 information in this case was not voluntary, by relying on the paragraph at p. 527 E, of *Goi Ching Ang* he must have meant to say, on the authority of that paragraph, that even though a s. 27 statement is voluntary it is inadmissible if it was made before its maker had been given a caution against self-incrimination.

In view of the fact that the question that arose in *Goi Ching Ang* was one of voluntariness and not of self-incrimination, we were hesitant to accept *Goi Ching Ang* as laying down that for a s. 27 information to be admissible it must be given after he has been cautioned against self-incrimination. It may be that the paragraph at p. 527 E, was thrown in merely as a fortification for the ensuing opinion, based primarily on the trial judge's finding as to absence of voluntariness, that the information ought not to have been admitted.

We did not, however, need to arrive at an opinion on the question because in this case the question of fact whether a warning against self-incrimination was given to the appellant at any time before he gave those bits of information never arose since, as has been shown, the admission of the information was not objected to by the appellant's counsel.

Encik Karpal Singh's main submission was as to the defence of drunkenness. Subsection (2) of s. 86 of the Penal Code provides:

> Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

The appellant's defence was that he was in a state of unconsciousness at the time of the killing. This was what he said in his examination-in-chief (notes, p. 124 B-C):

> Semasa saya pukul Ali, sebelum saya pukul Ali, ia telah jatuh ke tanah. Saya pun pukul beliau. Selepas itu saya nampak tangan saya berdarah. Apabila saya tengok darah itu saya pun muntah dan pening kepala. Saya terus menyandar ke kereta. Selepas itu saya tak tahu apa yang terjadi. Selepas itu apa yang saya ingat ialah apabila saya sampai balik ke rumah pada malam itu.

It was submitted at the end of the trial to the effect that the appellant's state was due to intoxication and was such that he had no intention to cause death. Therefore the appellant could only be found guilty on a reduced charge of culpable homicide not amounting to murder.

In delivering his decision at the end of the trial, the trial judge said this (notes, p. 156 A-C):

> Di dalam kes ini tidak disangkal bahawa sebelum kejadian OKT telah meminum minuman keras seperti yang dinyatakannya dan juga seperti keterangan saksi pendakwaan SP4. Mahkamah juga tidak menolak kemungkinan OKT berada di dalam keadaan mabuk. Mahkamah boleh mengambil perhatian bahawa minuman seperti Samsu, Guiness Stout dan Beer boleh memabukkan.
>
> Sehubungan dengan ini adalah amat relevan mengimbas kembali keterangan OKT sendiri di dalam pembelaannya dan keterangan-keterangan lain yang menunjukkan perbuatan dan tingkah laku OKT sebelum dan selepas kejadian.

After setting out the acts and conduct of the appellant, the trial judge concluded at p. 156 of the notes:

> Berdasarkan fakta-fakta di atas adalah jelas bahawa kemabukan OKT sewaktu kejadian tidak banyak menjejaskan daya pemikiran, pertimbangan dan akal OKT sehinggakan ia tidak tahu apa yang dilakukannya.

At pp. 22 and 23 of his grounds of decision prepared for the appeal, the trial judge said this:

> The substantive defence advanced by the defence, is intoxication. As a result of having consumed too much liquor before the incident the accused had no recollection of what happened. To support this, SD2 the accused's mother was called to testify that when the accused and friends stopped over at her home that night she noticed the accused was drunk. He had a can of Carlsberg Beer with him. As regards to this proposition there is also

evidence before this court, that of the accused's uncle (SP12), who stated in his testimony that when the accused and friends came in he noticed only the deceased was drunk while the accused and SP4 were normal.

Counsel for the defence submitted that the state of drunkness *(sic)* the accused was in at the time of the offence had rendered him incapable of forming the requisite intent of committing murder.

The prosecution having proved its case against the accused beyond reasonable doubt, the onus now lies with the defence to show to the court that on the balance of probabilities he has a plausible defence. On the issue of intoxication there was no scientific evidence placed before me to support the contention of the defence.

Given the factual matrix of the case, the conduct of the accused before and after the commission of the offence was not consistent with the defence claim that the mental faculties of the accused were so affected to the extent that he could not have formed the requisite intention to inflict the fatal injuries found on the deceased. His claim that he heard a quarrel between SP4 and the deceased showed that he was conscious and mentally alert and was aware what was going on.

Then there is evidence that on the way home the accused asked SP4 to stop their car at a place where the accused alighted and threw the rotan, the deceased's trousers and parang into swamp. At another place along the road he again requested SP4 to stop the car. This time he went some distance into the oil palm plantation and hid the deceased's head by covering it with some oil palm fronds.

All these were done to eliminate evidence and traces of the crime that he had committed. This shows that the consciousness of his mind was not at all impaired or affected.

To understand the mention of the appellant's uncle, it is needful to state that the appellant's mother and uncle lived in the same house and that the uncle was present when the appellant, Meganathan and the deceased went to the house on the night of the murder.

Encik Karpal Singh's submission on the issue of drunkenness was that the grounds of decision showed that the trial judge misdirected himself in rejecting the defence of drunkenness on the ground of absence of scientific evidence and that the contents of the passage that has been quoted from the grounds of decision were inconsistent with the trial judge's finding expressed at the end of the trial that the appellant was drunk.

It was clear to us, as far as the grounds of decision were concerned, that the trial judge did bear in mind that the standard of proof on the appellant as to drunkenness was one of balance of probabilities but that, after considering the appellant's conduct as proved by the prosecution, the trial judge did not find it probable that the state of mind of the appellant was at all impaired or affected by intoxication. In mentioning the absence of scientific evidence, the trial judge did not intend to say that the standard of proof on the appellant was such that his defence could not be accepted without the support of scientific evidence. What he meant was that looking at the evidence available as a whole it was not probable that the appellant was unconscious or had no intention to cause the death of the deceased and that if ever what was so obvious from the evidential material that was available could be disturbed, it could be disturbed only by some scientific evidence.

It was also clear to us that when, in delivering his judgment at the end of the trial, the trial judge said that he did not discount the probability that the appellant was drunk. He did not find that the appellant was drunk to the extent that he was unconscious or was incapable of forming the intention to cause death. After considering the conduct of the appellant, the trial judge found that the appellant was not that drunk.

In our view the evidence in its entirety clearly showed that the appellant killed the deceased deliberately for the purpose of obtaining a human skull that he believed was needed in order to win a four-digit lottery.